

**HPA Program Technical Review Task Force Meeting**  
**9-4 pm, Tuesday, August 13, 2002**  
**Lacey Community Center, Lacey WA**

**Final Meeting Summary**

**Agreements**

- The Task Force agreed on an initial set of three issues related to the HPA program to work on. Please see the set of issues at the end of this summary.
- The Task Force agreed on the composition of three work groups to address the three issues. Work group membership is also at the end of this summary.

**Action Items**

- For the next meeting, WDFW will provide:
  - Aquatic Plants & Fish pamphlet HPAs. Greg Christensen will provide Gold & Fish pamphlet HPAs.
  - A wall map showing the boundaries of the Department's regions.
  - Additional copies of Ecology's Permit Handbook.
  - Habitat Program's organizational chart.
  - Copies of the AWC 2000 Tax & User Fee Survey Part II, provided WDFW can obtain them in time.
  - Draft interim guidelines for Stormwater.
  - A copy of the Draft Enforcement Strategic Plan.
- The meeting summary for July 24, as amended at this meeting, will be posted at the WDFW website.
- Hedia Adelsman will report on information the Permit Assistance Center tracks regarding JARPA.
- Hedia Adelsman will provide WDFW with Ecology Water Right database contact information.

**Welcome, Meeting Purpose, Agenda Review, and Introductions**

Chairman Russ Cahill welcomed participants. He reiterated that the Task Force, in the time available to the Task Force, had an opportunity to address macro issues (not the entire Hydraulic Code) and to offer recommendations for actions that WDFW, the Fish and Wildlife Commission, and the legislature could take. He then turned the meeting to Vicki King, facilitator from Triangle Associates.

Vicki reviewed the day's agenda and asked for comments on the meeting summary. The summary was revised to indicate that one of the two issues the Task Force had been asked to address was overlapping stormwater regulations, "including a discussion of interim guidelines." With the addition of the latter wording, the summary was approved as final and authorized to be posted at the WDFW website.

**Meeting Attendees**

Task Force members then introduced themselves. A list of attendees, plus contact information, is at the end of this summary.

**Responses to July 24 Data Requests**

Following a break, WDFW staff (Gayle Kreitman, Regulatory Services Section Manager, John Broome from Enforcement and Peter Birch, Deputy Assistant Director for Habitat) presented

information that had been gathered in response to informational requests made on July 24. The following questions and responses were given. (Headings indicate the general topics discussed.)

### ***Compliance Issues***

*Question:* What do the compliance penalty numbers reflect?

*Response:* These numbers come from an activity reporting system. If anything, they underestimate the amount of time we spend on HPA compliance and assistance. WDFW's philosophy is to help people to become legal, not to punish them. Disposition data was requested from the courts that could help clarify the time spent. All violations, under current statutes, are "gross misdemeanors." There are two other groups involved in compliance: the prosecutor's office and the courts. Most violations were in the Puget Sound area where the courts are already the busiest. The issue is whether all three "legs of the stool" – enforcement, the prosecutor's office, and the courts – provide adequate support. Bail for a violation is \$1500. In cases involving minor violations, Enforcement tries to resolve problems without the courts. The courts only deal with the more serious cases.

*Request:* HPAs have priorities 1, 2 and 3 which likely impact enforcement priorities. Please describe what you see as the pluses and minuses.

*Response:* Our goal on priority 1 cases is to have them checked by Enforcement and the Area Habitat Biologist (biologist). This doesn't always happen, but the biologists do usually make a contact. On many of them, the issues are obvious. In other cases, the problems are subtler and you need teamwork. This brings one to workload issues. It takes travel time to get to the site. While officers try to be efficient, they also have other responsibilities and when a higher priority surfaces (such as a call about a dangerous animal), they have to respond to them first. Again, since the Puget Sound area is where most projects are, there is no easy answer as to where the system is breaking down and can be improved. In many cases, we work well together.

*Question:* Does priority 1, 2 and 3 relate to major, medium, and minor?

*Response:* To some degree, yes. Right now, there are no criteria for all three. The biologist identifies the priority. Threes tend to be more a workload issue than "minor."

*Question:* How many people work without a permit vs. those who violate their permits?

*Response:* There is currently no data on that.

*Question:* WDFW does not have authority to issue a stop work order, correct?

*Response:* Correct.

*Response:* WDFW doesn't have good data, but the Task Force could make useful recommendations in this area.

*Comment:* Speaking as a former prosecutor, if the state takes an issue more seriously, then county prosecutors tend to as well. The \$1500 fine is minute. (The size of the fine is set by court rules.)

*Comment:* The fine structure now defines violations as gross misdemeanors. There are no civil penalties, which is a problem. It's neither fish nor fowl – it's in limbo. The Task Force could recommend that we get organized and address civil penalties and the ability to issue stop work orders.

*Comment:* Not convinced there was an enforcement problem. My members have had cases reversed by higher authorities at WDFW – which indicated that some fines had not

been justified when issued. My group is opposed to civil penalties for enforcement if the program is not adequately administered locally.

*Comment:* So, the agency work needs to be better organized at the local level and to have a better picture across the board.

*Comment:* Agreed it was challenging to identify problems permittees experience which are indicative of systemic problems and which are the result of an individual. Perhaps it points to a training issue. One should look at both. If civil penalties were an option, it might lead to more consistency.

*Request:* An independent environmental audit is needed to get a handle on this issue. This could be a useful outcome of the Task Force. In the Puget Sound region, enforcement of fish passage at culverts is a big-scale problem, and there are problems in enforcement.

*Comment:* If WDFW is finding so many things out of compliance, perhaps it was because we were asking for too much.

*Comment:* Can we ask for criminal penalties to be able to donate payments to a WDFW fund, as a type of mitigation payment? When civil and criminal penalties went down the same path, it was often not clear how to get out of being “held hostage.” There is also confusion about what constitutes compliance.

*Comment:* Are there adequate penalties for the impact? Need disincentives to break the law.

*Comment:* People are relying on anecdotal information because there are no good hard numbers, but the agency is trying to get something usable. Perhaps the Task Force could make useful recommendations.

*Comment:* The whole program needs an independent audit, to get impartial information that could improve the program. WSDOT had had similar inconsistencies in administration in the past. Has WDFW looked at the impact of giving individual biologists “independent signature authority?”

*Comment:* The independent signature authority was a result of decentralization. Prior to that, there was a core group of four people who signed – that system probably led to greater consistency. Now, with many people authorized to sign, the result is less consistency.

*Comment:* This may have been a function of the merger of two previously separate agencies.

*Comment:* If that’s the reason, it’s important to know it.

*Comment:* In these budget times, the legislature is unlikely to respond favorably to a request for an independent audit of the program.

*Comment:* The HPA and the Hydraulic Code are part of an overall system that includes local government. While the current system is not perfect, it is better than if we didn’t have it.

*Comment:* People see docks for single-family projects as “minor” and don’t want to deal with them. (It was later clarified that HPA criteria for single-family residential marine bulkheads were set through statute – not at the discretion of WDFW.)

*Comment:* The Task Force should ask, what do we want enforcement to do; then identify what is going on with the courts. Then we can ask, is there unequal enforcement. We need information we can work with. It is preferred that an answer be developed within the Task Force, not to put pressure on the legislature.

*Question:* Is there a way to get a handle on HPA enforcement? What percentage of their time is spent on this?

*Response:* It’s one of the largest areas Enforcement reports on. As an estimate, officers spend 5% - 7% of their time on it. (They have many things they report on to put these numbers in perspective – such as hunting, fishing and ESA compliance.)

*Question:* Is there still a varying attitude among county prosecutors on HPA enforcement?

*Response:* Yes. The social benefit of enforcement is not so obvious. Violators are all of us – a person trying to improve his property. There may be a few who are cutting corners, but most are trying to do the right thing. WDFW prefers to give technical assistance and guidance rather than prosecuting and punishing. Most of those causing problems don't know what they should be doing.

*Comment:* A lot of local governments, including counties, are active in hydraulic permitting. Many county prosecutors are frustrated with the process and inconsistencies, so they don't want to prosecute violators. Is it better public policy to try to help them or spend money on courts? The group should look at all civil penalties if the group feels the courts will address the issues.

*Question:* How about the Walla Walla program example, where illegal people could come forward to seek help in becoming legal?

*Comments:* How will this program to bring people into compliance be paid for?

*Comment:* This is the first time we have had a program like that that was effective.

*Comment:* OK, but it's not a panacea. There are a lot of culverts out there; the problem is getting worse, not better.

*Comment:* An important point was raised – the issue of education. There is also a fear factor related to ESA. If the Task Force feels that the enforcement situation is not being properly administered, then the Task Force needs to look at legislative change (which is needed).

### ***Permits***

Bill Moore provided a handful of Ecology's Permit Handbook, to see if there were approaches that could be useful. WDFW staff will bring additional copies to the August 27<sup>th</sup> meeting, if received prior to the meeting.

A wall map of WDFW regions was requested. Comments were made on the duplicative processes anyone working in water has to respond to, such as Shorelines, water quality certifications, ESA consultations, HPAs, etc.

*Question:* What other permits are needed in addition to the HPA? Also, what other permit has the same focus as the HPA (*to protect fish life*)?

Hedia Adelsman agreed to check with the Permit Assistance Center regarding what is tracked to help answer these questions.

### ***Staffing***

A comment was made that Region 4 appeared to be understaffed and couldn't get around to seeing all the project sites. More detail is needed on staff process and complete permit information for the permittee. In response, City of Tacoma inspectors were cited as an example of why this may not be a workload issue. City of Tacoma inspectors seem to complete many more site inspections than biologists do. Others pointed out that the cases might not be comparable (urban vs. rural); that many situations were unique (not like enforcing building codes); and that biologists had responsibilities beyond inspections. It was noted that it would be helpful to have the biologists input on many of the items mentioned to see where they think we are strong/weak. In summing up, Russ indicated that perhaps the

Task Force could make useful recommendations on workloads, which might have implications for training.

### ***Database Issues***

In response to a question, staff indicated that WDFW was in the process of identifying the need and cost of an adequate database. A web-based capability could potentially cost \$3-4 hundred thousand. It was suggested that scanning is more cost effective, and that WDFW (Jim Eby) should contact Ecology (Water Rights) in regards to what they did with their database. Hedia will provide contact information.

### ***Cost of the program***

In response to a question, staff noted that the FTEs indicated in the table were part of the authorized funding. However, the sum for the program given here was larger because it included court and legal costs, which made the program cost more than the legislative authorization. Concern was expressed that additional costs could be loaded onto the program and then the total cost would be turned into fees. Russ assured him that no one had taken that step.

In response to a question about funding for the Forest and Fish program, staff indicated that it was a mixture of General Fund, WSDOT and federal funding. Nothing from the Licensing Department goes toward Habitat.

### ***Cost-Reimbursement***

Hedia Adelsman reported that any agency could use it. She said Ecology was using cost-reimbursement and thought it had a lot of usefulness for the HPA program. An amendment was made to simplify and force Ecology to write out their process, along with training the consultants as to what to look at. If consultants follow it, it works well and does speed things up. Concern was expressed at what could be considered the exorbitant level of consultant fees.

### ***Stormwater***

Staff reported that a small committee was developing ideas for interpreting the bill (ESHB 2866) to clarify what biologists are to do and to identify what is covered by an HPA and what is not. WDFW will bring that group's work to the Task Force for review and suggestions.

## **Prioritizing Issues**

Vicki then explained the process for the group to complete its prioritization of the issues. A summary of the initial prioritizing from July 24 was given to everyone. Task Force members, government representatives, and observers were then asked to meet in separate groups. Each was asked to identify the top five issues it wanted the Task Force to address and to give a report to the full group. These reports were delivered after lunch.

## **Issues and Initial Scope of Work**

The Task Force Members and Agency Representatives concluded the following issues were top priorities to work on. Due to the time frame allowed by the legislature, it was necessary to narrow these issues down to a realistic workload for the Task Force to address (**these issues are shown in bold**).

It was decided that the Task Force would break into smaller work groups to address the five top priorities starting with efficiencies, compliance/enforcement monitoring, and consistency at WDFW.

1. Fees
2. Stormwater
3. Efficiencies
  - **#1 Streamlining**
  - **#5 Equivalencies (other permits & regulatory requirements)**
  - #7 Pamphlets
  - #9 Code Review & Update
4. Accountability
  - **#2 Compliance/Enforcement Monitoring**
  - #8 Data Management
  - #4 Cumulative Impacts
5. Consistency for Service Delivery
  - **#3 Consistency at WDFW**
  - #6 Public Notice

#### **Initial Scope of Work for Efficiencies: *Streamlining & Equivalency***

- Identify a desired change and how to measure effectiveness.
- Multiple permits for same impact.
- Unclear instructions for a permit lead to frustration and extended application efforts – Need clarity about what’s required for a completed application and sufficient mitigation. Delineate where one permit ends and next begins.
- Identify commonalities with other permits. What other permit has the same focus as HPA (*to protect fish life*)?
- Clarify terms.
- Streamlining applications:
  1. Need clarity on what constitutes a complete application.
  2. Need clear policy on the steps to follow.
  3. Review program details and identify possible improvements.
  4. Are there legal and regulatory overlaps between programs, permits and licenses?
  5. Is there redundancy in information requested by different permits?
  6. Look at ways to reduce # of HPAs per year by writing regional, general and programmatic permits.
  7. Look at NRCS handbook as a model with clear standards that must be met.
  8. Education needed for project proponents on how to get a coordinated regulatory response.
  9. Identify common problems and develop “lessons learned” to help future applicants. (To use for planning.)
- Clarify agency’s authority.
- How to get applications completed and out of “on hold” status – so not left in limbo. (Can be because of mitigation that isn’t spelled out or agencies can’t all agree, which escalates over time.)
- What does AHB (Area Habitat Biologist) need to be able to give a clear response?

*Task Force welcomes staff input on these questions.*

**Initial Scope of Work for Consistency:**

- Staff training.
- Variability in permitting (on small scale projects).
- Readdress regionalization of permit issuance.
- *Question:* Was there a training program for staff when agency decentralized? *Response:* Yes.
- Have training that increases staff expertise (tiered approach).
- Is there a system of check and balances at the regional level?
- Staff turnover is a big issue.
- Look at training proposal being developed by TPEAC.
- Provide tools for applicants and biologists to encourage standardization (example: Aquatics Habitat Guidelines).
- Standard criteria for a complete application.
- WDFW Headquarters to periodically review regional permits to check for consistency.
- Clarify purpose and applicability of documents to different areas.
- Consistency with Administration Procedures Act.
- When there is an appeal, need a way to capture that decision for future cases.
- How best to appeal decisions? (Dual appeal process is confusing- which is better?)
- In the 1990's biologists regulating stormwater – outside authority. Need consistent, authorized approach.
- Regional sharing of ideas/information needed so there's statewide consistency.
- Consistency across the state in how landowners are treated.
- In-water work windows need to be consistent (WDFW has extended blackout period a' la ESA) – increases cost – can eliminate any period to do work.

**Initial Scope of Work for Compliance:**

- As built drawings/as built inspections necessary to identify compliance. Consistent standard we're reaching compliance on.
- WDFW needs adequate compliance program (Did they do what they said, as they said they would, within the timeframe they said they would?)
- Is compliance the same across the state?
- Does WDFW have adequate enforcement tools? (Example: Civil penalties)
- Has WDFW complied with statutory authority and administration procedures and consistency across the state?
- Who's responsible for compliance?
- Issue of tracking of compliance.
- Keep track of what WDFW is permitting.
- Need this for pamphlet program.
- Approval of technical service providers – as an option – may require training by WDFW.
- Level of discretion for compliance & enforcement. Need consistency of enforcement actions.
- Are there adequate penalties for the impact? Need disincentives to breaking the law.
- Reasonable to certify enforcement.
- WDFW is developing compliance monitoring guidelines – if available to Task Force, could be useful.

## **Work Groups**

The Members and Representatives have decided on teams to work on the above issues:

**Consistency®** Doug Myers, Ken Stone, Dick Gilmur, Hedia Adelsman, Bruce Wishart(?), Ed Manary

**Streamlining®** Willy O'Neil, Robyn Meenach, Nina Carter, Bart Madison, Bill Moore, Carol Piening

**Compliance®** Lea Mitchell, Lisa Brautigam, Greg Christensen, John Hollowed, Kristen Sawin(?), John Broome (WDFW Enforcement)



## Meeting Attendees and Contact Information

### Task Force Members and Alternates:

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### Invited Government Agency Representatives:

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### Observers:

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